American Red Cross Blood Services Johnstown Region, a Division of the American National Red Cross and Terri Dolan. Case 6-CA-26951

November 26, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND HIGGINS

On July 31, 1996, Administrative Law Judge Judith A. Dowd issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the decision in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, American Red Cross Blood Services Johnstown Region, a Division of the American National Red Cross, Johnstown, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in this Order.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent unlawfully disciplined and discharged employee Terri Dolan because she engaged in protected concerted activities, we find it unnecessary to rely on the judge's finding that Dolan's overall evaluation of "needs improvement" was not supported by the individual ratings she received.

Prior to the start of the presentation of the Respondent's case, the judge offered it an opportunity to request additional time in light of the General Counsel's amendment of the complaint during the hearing to allege that Dolan engaged in protected concerted activity on June 23 as well as on July 9 as earlier alleged. The Respondent deferred making any request until it had an opportunity to call witnesses. The Respondent did not raise the issue again during the hearing. Accordingly, contrary to its contention, we find that the Respondent has not established that it was prejudiced by the General Counsel's midhearing amendment of the complaint.

Leone Paradise, Esq., for the General Counsel. Richard V. Sica, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

JUDITH A. DOWD, Administrative Law Judge. This case was heard in Johnstown, Pennsylvania, on July 17, 18, and 19, 1995, based on a charge and an amended charge filed on January 9 and March 2, 1995, respectively, by Terri Dolan, an individual. On March 7, 1995, the Regional Director for Region 6 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing (the complaint). The complaint alleges that American Red Cross Blood Services. Johnstown Region, a Division of the American National Red Cross (Respondent or ARC) disciplined Terri Dolan by placing her on probation and terminated her employment, because she had engaged in concerted activities protected under Section 7 of the National Labor Relations Act (the Act) in violation of Section 8(a)(1) of the Act. On March 23, 1995, Respondent filed an answer denying that it engaged in unfair labor practices.

At the hearing, the parties were represented and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. During the course of the hearing, the General Counsel amended the complaint to add a charge that Collections Supervisor Carol Streilein violated Section 8(a)(1) of the Act by threatening Dolan with retaliation, because she had engaged in protected concerted activity. On the entire record, including my observation of the witnesses and their demeanor, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION—PRELIMINARY CONCLUSIONS OF LAW

Respondent is a corporation with an office and place of business in Johnstown, Pennsylvania, where it is engaged in the operation of a blood bank. During the 12-month period ending December 31, 1994, Respondent, in conducting its business operations, sold and shipped from its Pennsylvania facilities goods, material, and services valued in excess of \$50,000 directly to customers located outside the Commonwealth of Pennsylvania. Respondent admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent provides blood collection and distribution services for a geographic area encompassing parts of Pennsylvania, Maryland, Virginia, West Virginia, and Ohio. Respondent employs about 420 employees who work either in Respondent's primary facility in Johnstown, Pennsylvania, in secondary facilities, or in bloodmobiles which service the five state area.

The Center's hierarchy includes the following: Principal Officer Thomas Angle Jr., Director of Human Resources Jen-

¹ The General Counsel's motion to correct transcript is granted.

nifer Rairigh, and Assistant Directors of Nursing Joyce Norris, Joanne Sklarsky, and Nancy Meyer. Respondent's eight collections supervisors are Vicki Bennett, Margaret Kizak, Carol Streilein, Julia McDaniel, Carol Crimarki, Karen Saylor, Mariann Pozar, and Lois Cavallucci. All of the foregoing individuals are supervisors within the meaning of Section 2(11) of the Act and agents of the Respondent with the meaning of Section 2(13) of the Act.

B. Employee Terri Dolan

Terri Dolan was hired by Respondent as a part-time phlebotomist on June 12, 1993. Dolan's primary duties included traveling to various blood drives, where she would draw blood from donors. After 6 months, Dolan received her first employment evaluation. She scored an overall rating of "Fully Successful" and received many positive comments, including, "Terri provides good customer service and demonstrates flexibility when schedule changes are necessary."

1. Dolan's conduct at the "Quick-Fill" and the subsequent scheduling dispute

Dolan was assigned to work at a blood drive in Belleville, Pennsylvania, on March 2, 1994.2 The employees boarded ARC vans and left Johnstown at 6:15 a.m. in bad weather. It snowed heavily all day. At the conclusion of the drive, the employees reboarded the vans for the drive back to Johnstown. On the drive, which was over mountain roads, in nearly blizzard conditions, the employees were stranded for 2 hours behind a jackknifed tractor-trailer. Eventually, the convoy turned around and pulled into a Quick-Fill gas station and convenience store, some time between 11 p.m. and midnight. There were no customers in the store, only the attendant on duty. Collections Supervisor Karen Saylor told the employees to call their homes and she called Respondent's headquarters to ask for guidance. After the call, Saylor told the employees that her instructions were for the employees to stay overnight at a local motel. This news upset many of the employees and a loud, emotional discussion ensued. Dolan joined the discussion, emphasizing that she needed to get home to her 3- and 4-year-old children, who were with a sitter. One of the drivers, Gary Stoup, asked Dolan to step outside. Stoup assured Dolan that he would do his best to get her back to Johnstown. Dolan went back into the store and asked Saylor to take a vote to see whether most of the employees wanted to stay overnight or drive back to Johnstown. The majority of the employees voted to return to Johnstown and Saylor agreed. The employees got back in the vans and drove to Johnstown, where they arrived at approximately 1 a.m.3

Two days after the Belleville drive, Dolan submitted her summer vacation request to Debbi Nyanko, the interim staff scheduler. Nyanko told Dolan that she was scheduling extra bloodmobiles to make up for the collection losses due to the storm. She asked Dolan if she could work on Saturday. Dolan told Nyanko that she had not made any child care arrangements but that she would try to do so. After calling her regular sitter and her family, Dolan advised Nyanko that she had been unable to obtain child care. Later in the day, Nyanko twice interrupted Dolan's CPR class and asked if anyone would be able to work on Saturday, but no one volunteered. After her class, Dolan checked the schedule and saw that she had been assigned to work on Saturday. Dolan immediately went to Nyanko's cubicle and asked her why she had been scheduled to work on Saturday, after she had told Nyanko she could not find a sitter for her children. Nyanko replied that she had been instructed by Director of Nursing Barbara DeMuth to schedule Dolan. Dolan said, "What the hell am I supposed to do?" She also protested that anyone who had just gone through the storm following the Belleville drive should not be required to work the next Saturday. Nyanko refused to change the schedule to accommodate Dolan. Dolan subsequently found another employee who was willing to substitute for her on the Saturday bloodmobile.4

2. Dolan receives an oral warning

On March 23, 1994, Dolan was given an oral warning by Collections Supervisor Vicki Bennett, who was Dolan's immediate supervisor. The warning concerned the stop at the Quick-Fill and Dolan's scheduling dispute with Nyanko.

to the group as a whole. No witness other than Saylor testified that there were any customers in the store.

I can give no weight to the testimony of the supervisors other than Saylor who testified concerning the events at the Quick-Fill, since they were not present that evening. They admittedly received their information from either Saylor or employee Gary Stoup. I have found that Saylor's version was not accurate and Stoup's testimony at the hearing was different from what the supervisors testified he told them. I discount the hearsay and rely only on Stoup's testimony at the hearing.

⁴Debbi Nyanko was not called to testify and Respondent has not offered any explanation for its failure to call her. Nyanko's absence creates an adverse inference that had she been called, her testimony would have been unfavorable to the Respondent. *Appalachian Power Co.*, 253 NLRB 931, 933 (1980).

Respondent primarily relies on the testimony of its director of supply and logistics, Barry Yingling, with respect to Dolan's scheduling dispute with Nyanko. Yingling testified that Dolan used several vulgarities and was behaving so belligerently that he was afraid the disagreement might become physical. I credit Dolan's version of the incident over Yingling's. Dolan readily acknowledged that she said, "What the hell am I supposed to do?" but she credibly denied using any curse words, threats, or vulgarity. Yingling's description of Dolan's language and demeanor appears to be exaggerated, since, by his own account, he made no effort to intervene to defuse the situation, even though he was charged by Respondent with safety responsibilities. Yingling also testified that he did not report the matter to anyone until about a week later, and then to Assistant Director of Nursing Nancy Meyer, only for the purpose of insuring that Nyanko received recognition for behaving professionally.

I do not credit the unsupported testimony of Nancy Meyer that Yingling reported the Dolan-Nyanko dispute to her shortly after it occurred.

² All dates hereafter are in 1994 unless otherwise indicated.

³I do not credit the testimony of Karen Saylor concerning the events at the Quick-Fill. Saylor testified that in the presence of at least one customer, Dolan was completely out of control, was "yelling and hollering" at her for a total of about 15 minutes, and had to be physically assisted outside by Stoup, on two occasions. Saylor's testimony is contradicted by the five employee witnesses who were present that evening, including Gary Stoup, who was called by the Respondent. The employees credibly testified that Dolan was upset and possibly talked louder than some of the other employees, but that they were all talking excitedly. Employees also testified that Dolan was not yelling at Saylor but generally talking

With respect to the Quick-Fill incident the warning states that Dolan "in a public place, proceeded to act very inappropriately. She complained bitterly about A.R.C. and how the organization does not have any regard for its employee's [sic] safety. The complaining contained cursing and was done in front of non-Red-Cross personnel." As far as the dispute with Nyanko, the warning states: "Terri proceeded to act inappropriately to the scheduler. Once again, she used inappropriate language (cursing) and again made statements concerning the Johnstown Region's lack of regard for employee safety." The warning concludes with "Planned Action Steps: If Terri has one more episode of this type of behavior, further disciplinary action will be taken up to and possibly including termination."

3. Dolan complains about the working hours of the Millheim Blood Drive

On May 26, Dolan participated in a blood drive in Millheim, Pennsylvania. Laurie Byington, the drive organizer, set the hours from 1 until 7 p.m. Before any donors arrived, Dolan approached Byington and told her that a drive scheduled from noon until 6 p.m. would be better for the employees. She pointed out that under the schedule set by Byington, employees would not get home until 11:30 or 12 p.m., and that many of them had to work the next day. Byington told Dolan that the later hours were more convenient for donors and the drive would be more successful as scheduled.⁵

4. Meeting conducted by Principal Officer Tom Angle

On June 23, Principal Officer Thomas Angle Jr. called a mandatory meeting of the Johnstown employees to discuss his plan to schedule Sunday bloodmobiles. Also present at the meeting were Director of Nursing Barbara DeMuth and Assistant Directors of Nursing Joyce Norris and Nancy Meyer. Angle regularly encouraged employees to speak out at any of the meetings he conducted. After Angle finished speaking, he asked whether any of the employees had questions. Dolan raised her hand and asked what management was going to do to retain staff.6 She told Angle that she was a part-time employee, that she was required to work an average of 45-50 hours per week, and she was told that her hours could not be reduced. Angle stated that he could not answer Dolan's question on a personal basis but he would have to start watching the employees' hours, or he could be in trouble with the State. Employee Stan Wright then stood up and said, "Tom, what Terri is saying is what we all feel about the hours worked." A third employee, Karen Shaffer, asked "what would be an appropriate number of hours for

a full-time employee to work—40, 50, 60 hours?" Angle hesitated and then replied that 55 hours would be an acceptable amount. At that point, Barbara DeMuth leaned over to Nancy Meyer and said, "Let's get them out of here. Let's get them out of here now." DeMuth signaled Angle to end the meeting and employees, including Dolan, left for a blood drive at the Richland Mall.

That afternoon, Angle went to the bloodmobile site and looked in on Dolan, who was in her unit performing blood collection work on a donor. Dolan noticed that when Angle came in he had a big smile on his face. Angle stated to Dolan "Why don't you take the rest of the day off." Dolan asked him if he was serious, but he only smiled again and then walked away. Dolan went to the supervisors on duty, Carol Crimarki and Joyce Norris, and repeated what Angle had said. The supervisors told Dolan that Angle did not mean what he said and that she could not be excused. Dolan worked the rest of the day.

5. Employees organize a meeting to discuss working conditions

Throughout the months of April, May, and June, employees frequently discussed their concerns about working conditions at ARC during van rides to remote blood collection sites. These trips could take as long as 4 hours one way. Dolan and other employees discussed such topics as the need for a winter travel policy, the lengthy hours employees were required to work per week, and the length of the workday. A number of Respondent's employees decided to hold a meeting to discuss ways of presenting some of their concerns about working conditions to management. Dolan participated in recruiting employees to attend the meeting. She spoke to at least 20 employees, either on the phone, or in ARC vans during drives to collection sites. On the day before the scheduled meeting, Tom Angle called employee Daniel Faight, one of the meeting organizers, and asked him to report any employee comments back to him.

The meeting was held on July 9 and was attended by about 35 to 40 employees. During the course of the meeting, Dolan spoke out about the need for a winter travel policy and for full benefits for part-time workers. Thirty-five employees, including Dolan, signed a petition stating "resolve to establish an organization to present our concerns regarding personnel policy to our administration in order to restore morale, clarify existing policy and make recommendations for needed changes."

Dolan receives a written warning, a performance rating of "Needs Improvement," and is placed on probation

On July 13, Dolan met with her immediate supervisor, Vicki Bennett, and Assistant Director of Nursing Joyce Norris for her annual performance review. Norris began the review by telling Dolan that her questions to Tom Angle during the June 23 meeting were disrespectful and inappropriate.

⁵I credit the testimony of Dolan and Charles Buck over that of Byington. Dolan and Buck both testified that Dolan's discussion with Byington occurred before the drive began, when no donors were present. Buck also supported Dolan's testimony that the discussion was neither loud nor angry. Buck was a particularly credible witness. I was favorably impressed by Buck's demeanor during his testimony and I note that he no longer works for the ARC, and is therefore not subject to workplace influences. Byington's testimony, on the other hand, is unsupported, even though Respondent's charge nurse, Ann Brokloff, was present during the drive. Brokloff was not called to testify by the Respondent.

⁶ Dolan testified that in her view, the ARC was overscheduling current employees because of the high rate of staff turnover.

⁷The employees held a second meeting on July 23 to discuss working conditions. Dolan again encouraged other employees to attend and she herself attended and spoke at the meeting. At the second meeting Dolan and other employees contributed to a fund to retain an attorney to advise the employees in their dealings with management.

Norris then showed Dolan a letter from Laurie Byington, dated June 28, about the Millheim blood drive. Byington's letter was addressed to Dolan's supervisor, Vicki Bennett, and essentially accused Dolan of complaining about the ARC in the presence of donors.8 Among other things, Byington stated, referring to Dolan, "I do, however, care about our donors and hope they are not exposed to more staff with such a rude and unprofessional manner" Dolan told Norris that the letter was not correct and asked her to contact the charge nurse who supervised the drive, Ann Brokloff, and/or the sponsor and his wife who had been present that day. Dolan told Norris that the room where the drive took place was small and that anyone who was there would be able to confirm that Byington's accusations were not true. Norris refused Dolan's request to contact other witnesses and advised Dolan against contacting anyone on her own.

Norris issued Dolan a written warning which states, in pertinent part, "at a bloodmobile on May 26, 1994 at the American Legion in Millheim, it was observed that inappropriate conversation was noticed in front of donors." Under "Planned Action Steps" the warning reads: "Terri has been previously warned that public complaints about the ARC are inappropriate and may warrant disciplinary action. . . Any further valid reports of that nature will result in termination." Dolan refused to sign the written warning and wrote in the comments portion of the form that she wanted ARC to arrange an interview with the sponsor of the Millheim drive.

During the meeting, Bennett gave Dolan her annual performance appraisal. The evaluation consisted of ratings on various criteria submitted by six supervisors who had worked directly with Dolan as well as separate ratings by Bennett. Prior to the evaluation, Bennett had also assigned Dolan the task of suggesting 10 ways to improve "customer service." During the performance review, Bennett informed Dolan that she had evaluated Dolan's suggestion list as "needs improvement." Bennett told Dolan that her list of suggestions was inadequate because it did not address ways to improve service to donors. Bennett gave Dolan an overall evaluation of "needs improvement."

Dolan was also given a notice that she had been placed on probation. The probation notice states, in pertinent part, "Terri has demonstrated continued poor customer service, inappropriate interaction with customers (poor public relations), and lack of respect of supervisory personnel." Dolan asked for an example of lack of respect for supervisors. Norris told Dolan that what she said to Tom Angle at the June 23 meeting was an example.

7. Collections Supervisor Carol Streilein's comments and warning to Dolan

On July 21, Dolan and Collections Supervisor Carol Streilein rode together to a blood drive. Dolan showed Streilein the list of 10 suggestions to improve customer service that she had prepared at Bennett's direction. Streilein read the list and commented that many of Dolan's suggestions should be implemented. Streilein expressed surprise

when Dolan told her that Bennett had rated the list as "needs improvement."

Streilein and Dolan continued their discussion over a meal break. Streilein told Dolan that she was an outspoken employee, and that the Johnstown Region "needed to set an example for the rest of the staff," they "needed a pigeon" and "they picked you." Streilein also said that if anyone asked her, she would deny that she had warned Dolan about being singled out by Respondent.

8. The Kizak controversy

On August 17, Dolan was working at a bloodmobile in Indiana, Pennsylvania. Collections Supervisor Margaret Kizak, who was in charge of the drive, approached Dolan, who was working in her unit. Kizak told Dolan that there were donor complaints about burning arms from the use of blood pressure cuffs. At the time, Dolan had two donors in her chairs and they were wearing blood pressure cuffs. Dolan asked her which donors had complained. Kizak told her that it had been a general complaint. Dolan responded, "My donors had not complained of burning arms."

At the end of the day, while the collections staff was still at the site of the blood drive, Dolan approached Kizak and asked her to sign the logbook she was keeping.¹¹ As she signed the book, Kizak commented that Dolan seemed defensive when Kizak had informed her about complaints from donors. Kizak told Dolan that she was the only one who made a comment and that one of the phlebotomists had thanked her. Kizak said that Dolan should have thanked her for the information. Dolan replied, "Well, thank you Peg."

Later that same evening, after returning to Johnstown, Kizak asked Dolan if she could speak to her in private. Dolan followed Kizak into an empty conference room. Kizak stated that she did not think that she should have signed Dolan's book. Kizak told Dolan that she did not like the way Dolan said, "My donors had not complained of burning arms." Dolan replied that her donors had make no complaints about burning arms and that she is careful in preparing donors' arms so that burning does not occur. Kizak commented that Dolan was defensive and Dolan replied, "You would be too if what happened to me in the past couple of weeks had happened to you." As she made this statement, she pointed at herself and emphasized "me" then pointed at Kizak and emphasized "you." Kizak said that she did not understand why Dolan was so defensive and told her that she did not think that the conversation would remain between them. Dolan left the room and got her logbook and Kizak crossed out her initials.

Immediately thereafter, Kizak called Bennett to complain about Dolan. The next day Kizak also complained to Barbara DeMuth, who told her to document the entire incident. On August 19, Kizak gave DeMuth a six-page letter describing the incident. DeMuth had a termination notice prepared for Dolan.

⁸ Bennett requested Byington to write the letter after she heard a rumor that Dolan had complained to Byington.

⁹ Bennett testified that a customer is a blood donor.

¹⁰ All of the witnesses, including Kizak, after a series of pointed questions by the General Counsel, agreed that Dolan spoke to Kizak in a moderate tone of voice.

¹¹ Following her probation, Dolan asked the supervisor in charge of each bloodmobile to sign a logbook. Dolan told each supervisor that by signing the book, the supervisor agreed that Dolan had not made any derogatory comments about the ARC and that she had not received any negative comments about her work performance.

9. Dolan's termination

On August 22, DeMuth called Dolan into a conference room. DeMuth gave Dolan her notice of termination. Dolan read over the notice which stated, in pertinent part, "Ms. Dolan again engaged in an inappropriate and loud confrontation with her supervisor at a mobile in the presence of donors." DeMuth refused Dolan's request to have Kizak present during the meeting. DeMuth simply repeated, "Terri it's over." Dolan said, "Barb, this did not happen" and showed her where Kizak had initialed her logbook at the close of the blood drive. She asked if Kizak would have initialed the book at that time, if there had been a loud confrontation. DeMuth continued to repeat, "Terri it's over." Dolan asked DeMuth to interview the employees who were at the blood drive. DeMuth told Dolan that there would no further discussion about the event. Dolan was discharged that same day.

III, DISCUSSION AND ANALYSIS

A. The Alleged Unlawful Discipline and Discharge

Section 8(a)(1) of the Act makes it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7." 29 U.S.C. § 158(a)(1). One of the rights guaranteed in Section 7 is the right to engage in "concerted activities . . . for the purpose of mutual aid or protection" 29 U.S.C. § 157. The Board has held that in order to find that activities are concerted the employee activities must have been "engaged in with or on the authority of other employees and not solely by and on behalf of the [individual] employee." Meyers Industries, 268 NLRB 493, 497 (1984). Under the Meyers' analysis, once the activities have been found to be concerted, an 8(a)(1) violation will be found if the employer had knowledge that the employee engaged in concerted activities, the activities were protected under the Act, and the employer's adverse action was motivated by the employee's protected concerted activities, Id.; Club Monte Carlo Corp., 280 NLRB 257, 261 (1986).

Once the General Counsel has established a prima facie case, by showing that the employee engaged in protected concerted activities and the employer had knowledge and animus, the burden shifts to the Respondent to demonstrate that the same action would have been taken, even absent any protected activity. Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981); NLRB v. Transportation Management Corp., 462 U.S. 393, 399 (1983).

1. Concerted activities

Dolan engaged in concerted activity when she voiced the grievance shared by a number of employees concerning the extensive working hours required by the ARC, during the June 23 meeting conducted by Angle. The meeting on June 23 was called by Principal Officer Thomas Angle to present his plan for adding Sunday bloodmobiles to the schedule. When Angle opened the floor for questions, Dolan was the first to protest that employees were already required to work excessive hours. Dolan stated that even though she was a part-time employee, she was required to work 45 to 50 hours

per week.¹² Other employees then joined Dolan in expressing their dissatisfaction with working hours. Employee Stan Wright said that Dolan was expressing the views of all of the employees when she protested about working hours and another employee asked Angle to explain what he thought was a reasonable number of working hours in a week. Dolan's questioning of Angle about the weekly working hours required by Respondent constitutes protected concerted activity.¹³

The complaint also alleges that Dolan engaged in concerted activity on July 9 when she attended and spoke out at the employee meeting called to discuss working conditions. Dolan brought up the need for Respondent to formulate a winter travel policy at the July 9 meeting and the record reflects that this issue was of great concern to a number of employees. The evidence also shows that the Respondent subsequently adopted a winter travel policy. Respondent does not contest the concerted nature of this activity, and I find that Dolan's participation in the July 9 meeting was protected concerted activity.

2. Knowledge and animus

Respondent acquired knowledge about Dolan's concerted activity at the June 23 meeting because most of upper management was present at that time. Principal Officer Thomas Angle, Director of Nursing Barbara DeMuth, and Assistant Directors of Nursing Joyce Norris and Nancy Meyer were all in attendance at the meeting and heard Dolan raise the issue of working hours. The concerted nature of Dolan's activities was apparent. Employee Stanley Wright stated in so many words that Dolan was speaking for all of the employees. Moreover, Dolan's questions triggered further inquiries about working hours from other employees, which only stopped when Angle called an abrupt end to the meeting. Both DeMuth and Norris, who witnessed Dolan's concerted activity, were directly involved in the decisions to discipline and discharge the employee.

The fact that Respondent closed the June 23 meeting immediately after other employees joined Dolan in raising questions about working hours suggests that Respondent was hostile to Dolan's concerted activity. Respondent's hostility was made manifest later in the day, when Angle sought out Dolan and taunted her by sarcastically telling her that she could take off the rest of the day. Subsequently, Assistant Director of Nursing Joyce Norris began Dolan's annual performance review with the comment that Dolan's questioning of Angle was disrespectful and inappropriate. Norris also notified Dolan that she had been placed on probation for al-

¹²The record reflects that the majority of Respondent's employees were being hired as part-time workers and then expected to work in excess of 40 hours per week.

¹³The Respondent has never contended that Dolan's questioning of Angle was not entitled to the protection of the Act. Respondent does contend it its brief that Dolan's questioning of Angle was not concerted activity because she was merely raising a personal concern. Respondent's contention is without merit. The Board has held: "Where an employee in the presence of other employees, complains to management concerning wages, or other terms and conditions of employment, such complaints constitute protected concerted activity, even though the employee purports to speak on behalf of himself or herself." Avery Leasing, 315 NLRB 576, 580 fn. 5 (1994), and cases cited.

leged misbehavior, including "lack of respect for supervisory personnel." Norris cited Dolan's questioning of Angle as an example of Dolan's disrespect for supervisors. Based on this evidence, and the record as a whole, I find that Respondent had both knowledge of and animus toward Dolan's concerted activities

There is no direct evidence that Respondent knew abut Dolan's participation in the July 9 employee meeting, but the circumstantial evidence suggests knowledge. Dolan signed a petition resolving that an organization should be formed to present to management the employees' concerns about working conditions. Copies of this petition were circulated to all of Respondent's employees in the field. Dolan had already revealed herself as an activist when she questioned Angle at the June 23 meeting and it is uncontested that Angle knew about the employee meeting on July 9. I find this evidence sufficient to support an inference the Respondent knew about Dolan's participation in the July 9 employee meeting. It is also reasonable to infer that Supervisor Carol Streilein's July 21 warning to Dolan about being an outspoken employee was meant to include her participation in the July 9 employee meeting. Streilein's warning is further evidence of the Respondent's hostility toward Dolan's protected concerted activities. In any event, there is sufficient evidence showing Respondent's knowledge and hostility toward Dolan's protected activities with respect to the June 23 meeting alone.

I therefore find that the General Counsel has established a prima facie case that Dolan's protected concerted activities were a motivating factor in Respondent's decision to discipline and discharge Dolan. Under Wright Line, the burden then shifts to the employer to demonstrate that it would have taken the same action in the absence of the employee's protected activities. Wright Line, supra, 251 NLRB at 1090–1091.

3. Respondent's defenses

Respondent contends in its brief that Dolan was placed on probation and discharged solely for engaging in the misconduct alleged as the basis of these adverse actions. I will consider each of these actions separately.

a. The probation status

The alleged misconduct that was the basis of Dolan's written warning and probation was the letter from Byington accusing Dolan of complaining about the ARC in the presence of donors. The credited evidence shows, however, that Dolan did not complain in the presence of donors but only in a private conversation with Byington, before the blood drive began. Although Dolan denied Byington's charge and requested in writing that Respondent contact the charge nurse or sponsor to verify Dolan's behavior during the drive, Assistant Director of Nursing Joyce Norris refused to conduct any investigation. Not only did Norris refuse to contact any witnesses who might support Dolan's story, she also warned Dolan not to contact anyone on her own. Respondent's refusal to investigate or to allow the accused employee to contact witnesses strongly suggests that Respondent was more concerned with disciplining an outspoken employee than in ascertaining the truth.

In addition to her alleged misconduct at Millheim, Dolan was placed on probation for receiving an annual evaluation

of "needs improvement." Dolan's overall evaluation of "needs improvement" is not supported by Respondent's documentation. Out of 78 separate ratings by supervisors other than Bennett, her immediate supervisor, Dolan received 8 "exceeds expectations," 61 "fully satisfactory," 9 "needs improvement," and no "clearly unsatisfactory." All of the "needs improvement" ratings were in two categories, "adaptability" and "ability to accept change." Bennett gave Dolan eight "fully satisfactory," four "needs improvement," and one "clearly unsatisfactory," on her rating sheet. Although Bennett's ratings were lower than those of the other supervisors, Bennett herself acknowledged that she did not work with Dolan any more than the other six supervisors who executed rating sheets and there is no evidence showing that the Respondent had a policy of according more weight to the immediate supervisor's ratings. Adding together all of Dolan's ratings—8 "exceeds expectations," 69 "fully satisfactory," 13 "needs improvement," and 1 "clearly unsatisfactory"—they do not appear to justify an overall evaluation of "needs improvement," which was the next to the lowest rating possible for an employee.

Whether Dolan's assignment to write 10 suggestions for improvements in donor service factored into her overall evaluation is unclear. Bennett testified at one point that the list was a factor, but she later stated that Dolan would have received the same overall evaluation regardless of the suggestion list. In any event, Bennett's rating of Dolan's suggestion list as "needs improvement" does not appear to be valid, Assistant Director of Nursing Joyce Norris marked two of Dolan's suggestions as "good" and two as "ok." With respect to the remaining six suggestions, Bennett testified that they were unacceptable because they would not benefit donors. For example, Dolan suggested locating donation sites with fewer steps to accommodate older donors and sites with adequate air conditioning and heat to make donors more comfortable. At the hearing, Bennett insisted that this suggestion would not benefit donors. Not only is Bennett's assertion unreasonable, the evidence shows that Respondent subsequently implemented this suggestion by directing its staff to locate alternative sites to those which had poor heating ventilation, lighting, and unscreened windows.

b. The discharge

With respect to Dolan's termination, the discharge notice states that the action was taken because Dolan "again engaged In an inappropriate and loud confrontation with her supervisor at a mobile in the presence of donors." This statement refers to Dolan's response to Kizak's admonition about donors complaining that they had burning arms. During the termination interview with Director of Nursing Barbara DeMuth, Dolan denied that she had loudly confronted Kizak in the presence of donors, but DeMuth refused to investigate or to bring in Kizak for a face-to-face discussion. It is difficult to understand why DeMuth was so adamant in her refusal to check the facts, since even Kizak's letter documenting the alleged misconduct does not accuse Dolan of engaging in "an inappropriate and loud confrontation with her supervisor . . . in the presence of donors." If DeMuth had checked with employees who were working near Dolan during the bloodmobile she would have found that no such "loud confrontation" occurred. DeMuth might even have learned from Kizak herself that Dolan spoke in a normal tone of voice during their conversation about donor complaints. Kizak acknowledged as much during the hearing. It may be that Dolan and Kizak both raised their voices during their subsequent discussion at headquarters but that is not the reason given for Dolan's discharge. Moreover, even accepting Kizak's account of Dolan's conduct at headquarters, Dolan was angry and upset at what she perceived to be Respondent's efforts to discharge her and Kizak's role in this effort, but aside from talking loudly and pointing at Kizak for emphasis, she engaged in no misconduct.

Under the circumstances, I must find that Respondent failed to sustain its Wright Line burden of showing that it would have disciplined and discharged Dolan regardless of her concerted activities. I therefore conclude that the decision to discipline and discharge Dolan was motivated by her protected concerted activities, in violation of Section 8(a)(1) of the Act. See Hickory Creek Nursing Home, 295 NLRB 1144 (1989); Clinton Food 4 Less, 288 NLRB 597 (1988); Tama Meatpacking Corp. v. NLRB, 575 F.2d 661 (8th Cir. 1978). 14

B. The Alleged Threat of Retaliation

An employer violates Section 8(a)(1) of the Act by directly or impliedly threatening an employee with retaliation for engaging in union or protected concerted activities. The general test applied to determine whether an employer threatened an employee in violation of Section 8(a)(1) of the Act is "whether the employer engaged in conduct which reasonably tends to interfere with, restrain or coerce employees in the free exercise of rights under the Act." NLRB v. Almet, Inc., 987 F.2d 445 (7th Cir. 1993); Reeves Bros., Inc., 320 NLRB 1082 (1996).

On July 21, about 1 month after Dolan had spoken out at the meeting conducted by Angle and several weeks after Dolan participated in an employee meeting concerning working conditions, Collections Supervisor Carol Streilein issued a warning to Dolan. The credited evidence shows that Streilein told Dolan that she was an outspoken employee. that Respondent needed to set an example for the rest of the staff, that they "needed a pigeon" and, pointing at Dolan, "they picked you." Streilein's references to Dolan being an outspoken employee and Respondent needing to set an example for the other staff and needing a "pigeon" is an obvious threat of retaliation against Dolan for speaking out about employees' working conditions. The fact that this threat was delivered only about 1 week after Dolan had received a written warning, an evaluation of "needs improvement," and was placed on probation, also adds to the coercive impact of Streilein's statement. I therefore find that the Respondent violated Section 8(a)(1) of the Act by threatening an employee with unspecified reprisals for engaging in protected concerted activities. See Marsak Leasing, 313 NLRB 817, 823 (1994), and cases cited. 15

CONCLUSIONS OF LAW

- 1. The Respondent, American Red Cross Blood Services Johnstown Region, a Division of the American National Red Cross, is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the National Labor Relations Act.
- 2. Respondent violated Section 8(a)(1) of the Act by disciplining and discharging an employee because she engaged in protected concerted activities.
- 3. Respondent violated Section 8(a)(1) of the Act by threatening and employee with unspecified reprisals because she engaged in protected concerted activities.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that Respondent be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having disciplined and discharged an employee for discriminatory reasons, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in F. W. Woolworth Co., 90 NLRB 289 (1950), plus interest as computed in New Horizons for the Retarded, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁶

ORDER

The Respondent, American Red Cross Blood Services Johnstown Region, a Division of the American National Red Cross, Johnstown, Pennsylvania, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Disciplining or discharging employees because they engaged in protected concerted activities.
- (b) Threatening employees with reprisals for engaging in protected concerted activities.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action to effectuate the policies of the Act.
- (a) Within 14 days from the date of this Order offer Terri Dolan full reinstatement to her former job or, if that job no

testified that she and Dolan had a "friendly working relationship." The fact that Streilein and Dolan may have had a friendly relationship does not alter the coercive impact of her warning. Streilein did not purport to be speaking for herself, but on behalf of management, when she warned Dolan that she had been singled out because she was an outspoken employee. Thus, Streilein told Dolan that "they," meaning Respondent's management, needed a pigeon and Dolan was it. Since Streilein was a supervisor she would reasonably be perceived by an employee to be a spokesperson for management. *PPG Industries*, 251 NLRB 1146, 1155 (1980).

¹⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁴ Respondent contends in its brief that the ARC did not discipline or discharge other employees who openly engaged in protected concerted activities. The fact that the Respondent may not have taken adverse action against all of its other employees who engaged in protected concerted activities does not create an inference that Respondent did not discriminate against Dolan. The Board and the courts have long rejected similar arguments. See Glenoaks Hospital, 273 NLRB 488, 491, 491 fn. 16 (1984).

¹⁵Respondent contends in its brief that Streilein's warning did not violate the Act, because Streilein was a friend of Dolan. Streilein

longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed. Make whole Terri Dolan for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline and discharge and within 3 days thereafter notify the employee in writing that this has been done and that the discipline and discharge will not be used against her in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Johnstown, Pennsylvania, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 9, 1995.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discipline, discharge, or otherwise discriminate against any employees because they engaged in protected concerted activities.

WE WILL NOT threaten employees with retaliation because they engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Terri Dolan immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the unlawful discipline and discharge of Terri Dolan and notify her in writing that this has been done and that the discipline and discharge will not be used against her in any way.

AMERICAN RED CROSS BLOOD SERVICES JOHNSTOWN REGION, A DIVISION OF THE AMERICAN NATIONAL RED CROSS

¹⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."